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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, ALSO KNOWN AS JACK ATCHLEY,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of the State of California (R. 560-574) is reported in *People* v. *Atchley*, 53 Cal.2d 160, 346 P.2d 764 (1959).

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of California was entered on December 1, 1959 (R. 560). A timely petition for rehearing was denied by that court on December 30, 1959 (R. 575). On March 28, 1960, by order of Mr. Justice Douglas, the time within which to file a petition for writ of certiorari was ex-

tended to April 28, 1960 (R. 575). The petition was filed on April 26, 1960, and granted on May 23, 1960 (R. 576). The jurisdiction of this Court rests on 28 U.S.C. 1257(3) and 2101(d). See also Rule 22(1) of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of California, Article I, Section 13:

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his

failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. . . ."

Constitution of the State of California, Article VI, Section 4½:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California Penal Code, Section 189:

"All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

California Penal Code, Section 190:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life."

California Penal Code, Section 190.1:

"The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

"In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury."

QUESTIONS PRESENTED

1. Where a petitioner gives a voluntary statement to his insurance agent involving the details of the offense with which he is charged and the insurance agent upon request of the police repeats this interview with petitioner in order that it may be tape recorded, does the admission of such tape recording in evidence constitute the use by the state of a method of law enforcement which is constitutionally impermissible?

2. Where a petitioner in the state trial court does not deny the voluntariness of his incriminating statements after a foundation has been laid as to their voluntary nature and where his counsel on argument states that if the prosecution had not introduced such statements he would have, does the introduction in evidence of such statements constitute a denial of due process of law?

3. Is the taking of a statement by the police from a petitioner either suspected of or charged with crime prior to the time such petitioner obtains an attorney of his own choice a denial of due process of law?

STATEMENT OF THE CASE

At approximately 2:30 a.m. on August 3, 1958, Mrs. Atchley was shot and killed in the front yard of her home in Gridley, Butte County, California (R. 100, 111, 266).

Several days previously she had separated from her husband and moved with her children from Palermo to Gridley (R. 74, 372). On the evening of August 2 she had taken her eldest daughter together with a young couple to a dance (R. 75, 78-9, 85). They returned to Gridley about 12:15 a.m., she left her daughter at home and drove to Oroville to take the other couple home (R. 76, 81, 87). While she was doing this, petitioner at about 12:30 a.m. came to her home (R. 112). He parked his car a block away and walked to the house (R. 112, 114, 172-3). When he did not see Mrs. Atchley's car and no one answered the door he left and searched for Mrs. Atchley around several bars (R. 375-6). He returned to her premises at about 1:20 a.m. (R. 118-9, 386). He again parked his car a block away from the house, took from the glove compartment of his car a .22 caliber gun which he placed in the belt of his trousers and went to her house through the back alley (R. 118-119, 376-8). He remained in a shed in the back of the premises for a short time and then waited in the back until he could see the headlights of his wife's car as she drove in (R. 376-8).

When Mrs. Atchley returned about 2:25 petitioner was on the side of the house opposite the carport (R.

377). Mrs. Atchley left the car and neared the front door of the house with the keys in her hand (R. 377-8, 380). Petitioner stepped from the corner of the house toward her (R. 377-8). In the next few minutes Mrs. Atchley was shot six times, once in the head, the left breast, three times under the right arm and once in the back (R. 256-262). Five empty cartridge cases were found so close to each other as to indicate that the shots had been fired from the gun in approximately the same position (R. 91, 178). The victim's clothing indicated that the gun was at least two feet from the victim at the time of the shooting (R. 147).

The neighbors had been awakened by a woman's voice hysterically crying "Oh, don't, don't" (R. 96-7, 105). This was followed by a series of shots (R. 96-97, 105). They observed petitioner in a stooping position shooting toward the ground (R. 97, 101, 103). Their view of the body was obscured by a fence (R. 97, 101, 102). The neighbor asked "What in the hell is going on over there" (R. 97). Petitioner immediately left the scene in a very fast manner, obtained his car and drove away at a high rate of speed (R. 98, 102, 113-115). Petitioner returned to his home in Palermo, concealed the holster in a rubbish barrel and buried the gun used in the killing beneath a clod of dirt in his backyard (R. 170-2, 175-6). He then went to bed (R. 400-401).

The police were notified and arrived at the murder scene at 3:07 a.m., August 3 (R. 88-9, 100). Petitioner

was contacted at his home in Palermo at 4 a.m. and brought to the county jail (R.400-401).

Petitioner was first questioned at 6 a.m. by Mr. Anderson, an investigator for the District Attorney's office (R. 104-5, 149-152). He stated that he was not in Gridley that night, denied owning a .22 caliber automatic but stated that his wife had formerly owned one which she sold to another man about a month previously (R. 150-2). He stated that he had retired in Palermo at 12:30 a.m. (R. 151); he also stated that he had heard a Mr. Jones had threatened Mrs. Atchley and he might have done the shooting (R. 151).

Petitioner was not again questioned until 11:30 p.m. on August 3, when an investigator for the State Department of Justice arrived (R. 121-122). This investigator, Mr. Lazier, introduced himself to petitioner and told him that he had been requested by the District Attorney to assist in the investigation of the murder of Mrs. Atchley (R. 122). Mr. Lazier made no promises of immunity or threats to induce petitioner to talk to him (R. 122). Petitioner knew he was booked for investigation of murder and did not appear nervous (R. 129-30).

In outlining his activities on August 2-3, petitioner denied going to Gridley, presently owning a .22 caliber automatic and gave a similar statement to that given to Mr. Anderson about his wife's selling such a gun to another man (R. 123). He stated he thought a man by the name of Braxton Jones (a former husband of Mrs. Atchley) had killed her as he had heard

Mr. Jones had threatened both him and Mrs. Atchley (R. 124). Petitioner admitted that he, himself, had previously threatened Mrs. Atchley but stated that she was the type of woman he couldn't live with or without (R. 125).

After this conversation with Mr. Lazier, another conversation was had with petitioner by Mr. Lazier, Sheriff Gillick, Deputy Sheriff Ishmael and the District Attorney (R. 126-7). The same information was obtained (R. 127). The questioning continued until about 5 a.m. on August 4 (R. 129). At this time petitioner was returned to his cell where he slept (R. 129). He did not wish breakfast (R. 129, 418-419).

At noon on August 4, after the police had located the gun and holster at petitioner's premises, the officers returned with them to the jail (R. 127-8). They made no promises or threats to petitioner (R. 127). They showed the articles to petitioner who stated "I heard you had located the gun" (R. 130). Petitioner then changed his former story and admitted he had buried the gun in the back yard and placed the holster in the trash barrel where it was found (R. 130-1). He admitted that the first statements he had given the officers were not true (R. 131). Petitioner at this time stated he had driven over to Gridley on the night of the shooting, parked his car about one and a half blocks away from his wife's home, entered the premises by way of the back alley and spent some time in the shed in the rear of the premises (R. 131, 133). He felt if his wife saw his car, she would not stop (R.

131-2). When he heard his wife's car come into the carport he went around the corner of the house and proceeded toward his wife (R. 132). His wife had a gun in her hand which after a struggle went off several times (R. 132). He wrestled this gun away and it went off several additional times (R. 132). By then she was lying on the ground so he took the gun, drove back to Palermo, buried the gun and concealed the holster (R. 132).

Late in the afternoon of August 4, petitioner telephoned Ray Travers who was his friend and insurance agent and asked him to come to the jail (R. 224-5, 227, 231). Mr. Travers arrived at 10 a.m. on August 5 (R. 224). He had a conversation with petitioner relative to an insurance policy on the decedent which was payable to her children (R. 225-6, 230, 232). During the course of this conversation, petitioner of his own volition told Mr. Travers of the events occurring on the evening of the shooting (R. 232-233). As Mr. Travers was leaving the jail, he told the police officers about the statement petitioner had made to him (R. 224). At their request he agreed to have a second conversation with petitioner which could be tape recorded as Mr. Travers also needed more information for the insurance company (R. 232, 234).

At about noon on August 5, Mr. Travers returned and had another conversation with petitioner (R. 224). This conversation was a free and voluntary one, Mr. Travers making no promises or inducements

to petitioner (R. 225-227). Petitioner knew this information was going to be reported to the insurance company (R. 234). This conversation was tape recorded and introduced as Peo. Ex. 34 (R. 188-223, 238).

In this statement, petitioner stated that on the night of the shooting he was standing behind the corner of the house when Mrs. Atchley took her keys out and started to reach for the door; that he then stepped around the corner of the house (R. 195-6, 199). She saw the handle of the gun sticking out of the belt of his trousers, although his shirt was out, and she made a lunge for it (R. 196-7, 199). She grabbed for the gun, they struggled and petitioner bent her arm back (R. 196, 197). The gun went off three times (R. 196, 200). Petitioner pushed her by the shoulder, her arm came around and the gun went off twice more while petitioner had it in his hand (R. 196, 200). Mrs. Atchley fell right there (R. 196, 200).

Petitioner admitted that he had the gun over a year and stated he kept it in the glove compartment of his car (R. 199); that on the night in question he brought the gun to scare the fellow Mrs. Atchley was running around with but did not intend to kill Mrs. Atchley (R. 197). He admitted arriving at her house at 2 a.m. and waiting for her return at the corner of the house for about 25 minutes (R. 197, 199). He also admitted burying the gun and holster at his own premises after the shooting (R. 200).

Petitioner was not questioned again until August 7, 1958, when he was taken to view his wife's body at the mortuary (R. 152-3). In this conversation which was a free and voluntary one, petitioner told the same general story as in the Travers statement (R. 153-161). He also stated that the gun had been loaded previously, that it had held nine shells, three of which had at a prior time been expended on shooting some cats (R. 158-9); that when he returned to Palermo, there were no more shells in the gun. (R. 159).

At the trial, petitioner conceded the majority of facts contained in his statements but maintained that he had taken the gun only to scare his wife and had no intention of killing or injuring her (R. 373-379, 381). He testified that when he saw her returning alone, he stepped out to greet her, that she saw the gun visible under his shirttail; that she seized the gun and as he struggled to recover it the gun went off several times during the struggle and after he recovered it, it fired several times more (R. 378-381).

At the trial petitioner also related his history to the effect that he was born in Tennessee in 1917 (R. 355). He attended school through the third grade but could not read or write anything except his name (R. 358). Between 1943 and 1946 he moved to California and worked in various localities as an agricultural laborer and in the shipyards as a welder (R. 359-60.) He met the decedent in the Fresno area, became intimate with her in 1953 and she bore a child which he claimed was his (R. 360-2, 406). Later in 1953 he left the Fresno

area, moved to Palermo where he owned a bar which he later sold and then worked for his brother in the used car business (R. 363, 393). He subsequently entered the used car business himself (R. 393). This business netted him between $8-13,000 per year (R. 395-7). He bought several lots, built houses on them and for a period of time lived in one of the houses with a woman named Jewel Spoon who helped him maintain his used car business (R. 363 6). In the course of this business he had employed various attorneys and engaged in law suits in Butte County (R. 394-5).

In 1956 Mrs. Atchley returned to Palermo, ousted Jewel Spoon from petitioner's home and business and moved in with her five children (R. 367). Later in 1957, petitioner and Mrs. Atchley married in Georgia but the marriage was not publicized in order to avoid a reduction in child welfare aid which Mrs. Atchley was receiving from the county (R. 371, 407). Prior to the shooting, Mrs. Atchley had complained to the police of petitioner and had also expressed her fears of him to others (R. 84, 107, 509-510).

At the trial, petitioner did not challenge the voluntariness of any statements given to the police or to Mr. Travers. He contended he could not remember the contents of them as at the time he was in a state of shock (R. 412-13, 415, 417); that he had no sleep Saturday, no sleep Saturday night, no sleep Sunday, and no sleep Sunday night until about 4 a.m. (R. 382); that he asked for a lawyer about ten times and

told them if he got an attorney he would tell the truth (R. 382).

On cross-examination, he admitted that when he returned from the shooting he had undressed and gone to bed (R. 400-401); that when he was brought into the jail his attitude was one of shock over the grievous thing that had happened to his wife and he readily volunteered to cooperate with the officers to find the person who had done it (R. 403); that after he was questioned he was allowed to sleep (R. 418-419); that he rejected breakfast and complained to the officers that he was allowed to sleep through it (R. 419); he further stated that his reason for asking for an attorney was to "preserve the evidence, the fingerprints off the gun to where they could check them" (R. 436).

The case was tried on the theory of murder which was deliberate and premeditated and also on the theory of murder perpetrated by means of lying in wait (R. 31-35). The jury was also instructed as to second degree murder (R. 35-6); manslaughter (R. 37-9); justifiable homicide (R. 42-3); self-defense (R. 43-6).[1] They concluded that petitioner was guilty of murder in the first degree (R. 4).

A separate trial was had to determine the punishment to be inflicted and all of the evidence adduced at the trial on the merits was offered and admitted (R. 559). After petitioner introduced evidence the

[1] Petitioner did not request instructions on admissions or confessions and none were given except a cautionary one (R. 26).

matter was submitted, the jury instructed and returned a verdict of a death penalty (R. 59).

On an automatic appeal at which petitioner was represented by counsel, the California Supreme Court affirmed the judgment and order denying the motion for new trial (R. 560-574). With respect to the alleged "confession" the court found that regardless of whether it was designated an admission or confession it must be voluntary to be admissible (R. 564-566); that the statement in question was shown to be voluntary and in an earlier conversation petitioner had volunteered substantially the same statement without being asked; that there were no threats or inducements offered for this statement; that although there was deception there was no mental coercion (R. 567); the court further held that the trial court erred in restricting defense counsel in eliciting evidence to the effect that petitioner complained of not being permitted to contact a lawyer but held that under the circumstances of the case it was not reversible error (Art. VI, Sec. 4½, California Constitution) (R. 567, 573-574).

SUMMARY OF ARGUMENT

The Supreme Court of the State of California found that the "confession" in question was not the product of threats or inducements. It was a repetition of an earlier conversation in which the petitioner had volunteered to his insurance agent the same statements without being asked. Petitioner did not contradict

this testimony. This finding should be given great weight by this Court.

Petitioner at the time of the killing was a mature man, successful in business and had the funds to and did hire his own counsel in the trial court of the state. This same counsel with petitioner's consent was appointed by the California Supreme Court to represent him upon appeal. Contrary to the coerced confession cases before this Court, the record does not show that petitioner was held incommunicado, subjected to police brutality, threats of mob violence, not arraigned within the proper time or that promises, threats or coercion were used to obtain his statements.

The state authorities did not cause petitioner to give any statements which were not freely self-determined. The present case is not within the purview of *Ashcraft* v. *Tennessee,* 322 U.S. 143, 88 L.Ed. 1192, 64 S.Ct. 921 (1944); *Watts* v. *Indiana,* 338 U.S. 49, 93 L.Ed. 1801, 69 S.Ct. 1347 (1949); *Payne* v. *Arkansas,* 356 U.S. 560, 2 L.Ed. 2d 975, 78 S.Ct. 844 (1958); *Leyra* v. *Denno,* 347 U.S. 556, 98 L.Ed. 948, 74 S.Ct. 716 (1954) or *Spano* v. *New York,* 360 U.S. 315, 3 L.Ed. 2d 1265, 79 S.Ct. 1202 (1959).

A proper foundation was laid for the introduction of petitioner's statements in the trial court in which it was shown that they were not the product of improper police action but only a repetition of a previous spontaneous narration given to petitioner's insurance agent. These same statements were subsequently given to the police and again adopted by petitioner in his

testimony at trial. Petitioner did not choose to attack the foundation as to voluntariness laid in the trial court but on the contrary at the time of the argument to the jury his counsel stated that if the prosecution did not introduce these statements he would have.

The refusal of petitioner's request to contact counsel (which he had at that time not secured) did not render the taking of such statements by the police invalid per se. An overruling of the cases of *Crooker* v. *California*, 357 U.S. 433, 2 L.Ed. 2d 1148, 78 S.Ct. 1287 (1958), and *Cicenia* v. *LaGay*, 357 U.S. 504, 2 L.Ed. 2d 1523, 78 S.Ct. 1297 (1958), would neither promote justice nor restrict improper activity of the police. It would penalize the innocent and confer additional benefits upon the guilty.

ARGUMENT

I. This Court in Re-evaluating the Question of the Voluntariness of the Confession Is Not to Completely Eliminate From Its Consideration the Determination Made by the State Courts

A state court's judgment of conviction should not be set aside where the practices of the prosecution including the police as one of its agencies do not offend what may be deemed civilized standards of the Anglo-American world (cf. *Fikes* v. *Alabama*, 352 U.S. 191, 1 L.Ed. 2d 246, 77 S.Ct. 281 (1957)).

The corrective power of this Court over state courts in criminal cases is narrower than that which it exercises over the lower federal courts (*Watts* v. *Indiana*, 338 U.S. 49, 93 L.Ed. 1801, 69 S.Ct. 1347 (1949)).

In exercising its responsibility to independently scrutinize the state court record, this Court is not bound to accept solely petitioner's version of the historical facts but will review the totality of circumstances involved, giving some weight to the conclusion of the state court. Petitioner's contention that this Court's examination is limited to petitioner's own statements, eliminating any conflicts therewith, is contrary to this Court's prior decisions. Only that evidence which is uncontradicted by the state in its version of the attendant circumstances is considered in determining whether there is a denial of due process (*Stein* v. *New York*, 346 U.S. 156, 181-182, 97 L.Ed. 1522, 73 S.Ct. 1077 (1953); *Thomas* v. *Arizona*, 356 U.S. 390, 2 L.Ed. 2d 863, 78 S.Ct. 885 (1958); *Ashdown* v. *Utah*, 357 U.S. 426, 2 L.Ed. 2d 1443, 78 S.Ct. 1354 (1958); *Cicenia* v. *LaGay*, 357 U.S. 504, 2 L.Ed. 2d 1523, 78 S.Ct. 1297 (1958); *Crooker* v. *California*, 357 U.S. 433, 2 L.Ed. 2d 1148, 78 S.Ct. 1287 (1958)).

The California Supreme Court in reviewing the objection to the Travers statement now challenged as a "coerced confession" stated: (53 Cal.2d 160, 170-1, 346 P.2d 764 (1959)) (R. 566-567).

> "Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any of his recorded statements were untrue. Moreover, the recorded conversation demonstrates that Travers referred to the insur-

ance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

* * * * *

"While cross-examining Travers as to the voluntariness of defendant's recorded statements, defense counsel attempted to ask whether defendant had complained to Travers of not being permitted by the police, despite numerous requests, to talk to a lawyer. The trial court sustained an objection to this question and explained to the jury that the answer would have no bearing on the question of voluntariness. Defendant correctly contends that this ruling was erroneous, but fails to show that it was prejudicial. Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred."

This finding of the California Supreme Court is further supported by the position of counsel for petitioner at the trial of the matter. In his argument to the jury, counsel for petitioner stated: (R. 548-9)

". . . and I think when Jack Atchley was in there that first meeting at 10 o'clock and before they knew anything at all about a whole lot of these

things that you have heard here, that Jack Atchley did tell Travers definitely what occurred there. Now let me just—excuse me for a moment and I will pick up that statement. Now I asked and received through an order of this Court the entire statement that was given to the officers and I also—maybe by luck—this statement of Travers was in between and I was going to introduce this statement to you, Ladies and Gentleman, if the State had not put it in, I would have put it in. Now let me go over the important parts of this statement."

This language of petitioner's counsel demonstrates that he did not in fact believe the alleged confession was coerced and supports the determination of the California Supreme Court to this effect. Certainly if petitioner's counsel felt that the statement to Mr. Travers was coerced he would neither have relied upon it nor advised the jury that he would have introduced it in evidence if the prosecution had not. This conduct in no manner supports a claim of lack of due process on the part of the State of California in the use of such statements at the trial of the cause.

II. The Behavior of the State's Law Enforcement Officers Was Not Such as to Overbear Petitioner's Will to Resist and to Bring About Statements Not Freely Self-determined

Petitioner at the time of the shooting was 42 years of age (R. 352,355). He had several years successful experience in business as well as in agricultural activities, although he could not read or write (R. 359, 363-4,

366, 395, 397). He was of average intelligence and had no history of insanity or feeble-mindedness. He had previously employed attorneys for various actions in Butte County (R. 394-5). He was not held incommunicado by the police after his arrest but permitted to contact relatives and friends (R. 224, 354-5). His questioning by the police officers was not sustained over long periods of time without affording him food or sleep (R. 121-2, 126-27, 129-130, 401).

The murder was committed on the early morning of August 3. Although petitioner was questioned on August 3 and 4, there was approximately a twenty hour period without questioning prior to his first conversation with Mr. Travers. On August 4 at 6 p.m. petitioner requested Mr. Travers to come to the jail (R. 224). When Mr. Travers came at 10 a.m. on August 5 to bring some cigarettes and discuss the insurance policy on the decedent's life with petitioner in accordance with petitioner's request, petitioner voluntarily related the story of the shooting to him (R. 225, 232-233, 243). He also told Travers that he was endeavoring to secure an attorney (R. 233, 243-44).

As Mr. Travers left the jail he stopped to speak to the police and advised them of the statement (R. 224, 231). The police requested that he reinterview petitioner so that it could be recorded (R. 224, 234, 240). He agreed since he also needed some material for his insurance company (R. 224, 234, 240).

At noon, Mr. Travers returned. He made no threats, promises or inducements to petitioner (R. 225, 227,

247-248). He had the conversation which was taped (R. 226). Petitioner told the same story he had previously told Mr. Travers (R. 232, 241). Petitioner knew the material would be released (R. 224, 234, 240).

Another interview was not had with petitioner by the police until August 7 when he voluntarily told them the same story he had told Travers (R. 153-159, 164, 166-7).

Petitioner's own testimony contained in the record refutes his claim that he was not allowed to sleep for forty-eight hours during the first period of questioning (R. 418). It also refutes the fact that petitioner had engaged an attorney at any time during that period (R. 233, 243-4, 250). Further, the tape recording itself demonstrates that it was not replete with coarse or profane language but merely contained several instances of swearing (R. 196, 198).

Thus, it is submitted that the factual pattern here set forth is not comparable to that contained in petitioner's citations. The alleged confession was not obtained as the culmination of repeated and persistent questioning by relays of police officers over a period of a week or even thirty-six hours as in *Chambers* v. *Florida,* 309 U.S. 227, 84 L.Ed. 716, 60 S.Ct. 472, (1940), or *Ashcraft* v. *Tennessee,* 322 U.S. 143, 88 L.Ed. 1192, 64 S.Ct. 921 (1944).

Petitioner was not a member of a minority race, a minor who was held incommunicado for long periods of time before his confessions were secured as were the petitioners in *Haley* v. *Ohio,* 332 U.S. 596, 92

L.Ed. 224, 68 S.Ct. 302 (1948), and *Payne* v. *Arkansas,* 356 U.S. 560, 2 L.Ed. 2d 975, 78 S.Ct. 844 (1958). In *Fikes* v. *Alabama,* 352 U.S. 191, 1 L.Ed.2d 246, 77 S.Ct. 281 (1957), the petitioner was an uneducated Negro of low mentality, if not mentally ill. He was jailed for investigation, questioned for several days then driven 55 miles away to a state prison where he was put in segregation and questioned continuously over a period of about nine days. During this time he made two confessions. Also an attorney who came to see him was turned away and he was only once allowed to see his father. Petitioner's treatment cannot be compared to that in the *Fikes* case.

In *Watts* v. *Indiana,* 338 U.S. 49, 93 L.Ed. 1801, 69 S.Ct. 1347 (1949), petitioner was arrested on suspicion, held without arraignment, without counsel, friends or advice as to his constitutional rights for nearly a week until he finally confessed to murder. Most of this time he was kept in solitary confinement and interrogated by relays of police officers until long past midnight. Clearly this is not the present case.

Nor do the cases cited by petitioner relating to the use of psychological coercion and gross deception apply here. In *Leyra* v. *Denno,* 347 U.S. 556, 98 L.Ed. 948, 74 S.Ct. 716 (1954), the petitioner was suspected of murdering his mother and father. He was questioned for three days intermittently and allowed to attend his parents' funeral. After two hours sleep he was again interrogated. He had been suffering from an acute sinus attack and had been promised medical

relief. The doctor who came was in fact a psychiatrist paid by the prosecution. This psychiatrist questioned him at length after giving him numerous assurances that he would be let off easily if he confessed. He confessed and made subsequent brief confessions to his partner and a formal confession to the police several hours after the confession to the psychiatrist. The state courts found the statement to the psychiatrist was the product of mental coercion and reversed the conviction. After a retrial and a second appeal, the state courts found the subsequent confessions were properly admitted. This Court in reviewing a federal habeas corpus proceeding in the case held the undisputed facts were irreconcilable with petitioner's mental freedom to confess or to deny a suspected participation in the crime. The confessions extracted in the same place within a period of five hours as the climax of days and nights of intermittent, intensive police questioning were held inconsistent with due process of law since the victim was physically and emotionally exhausted and his ability to resist interrogation was broken to almost trance-like submission by the use of arts of a highly skilled psychiatrist.

In the instant case Atchley was not persuaded to make his statements to Travers. Travers was not a doctor but an insurance agent. Petitioner knew the statements he was giving to Travers would not be held confidential. He knew these statements would be conveyed to the insurance company. He was not induced to make the statements to procure payment of the

proceeds of the insurance policy since the proceeds were payable to the decedent's children. Whether or not petitioner was anxious to obtain certain of the proceeds of the insurance policy for the one child that he claimed, this can hardly be considered in the same category as the inducement of medical treatment from the relief of intense pain as was promised in *Leyra* v. *Denno,* 347 U.S. 556, *supra.* At the first conversation, Atchley admittedly volunteered all statements to Travers relating to the shooting. At the second and recorded statement he did not change his story but told Travers the same tale. It can therefore hardly be urged that this second story was the product of such an overbearing of petitioner's will as to make the statement not freely self-determined.

Again in the case of *Spano* v. *New York,* 360 U.S. 315, 3 L.Ed.2d 1265, 79 S.Ct. 1202 (1959), the petitioner was indicted by a grand jury. Accompanied by his attorney he gave himself up after a bench warrant had issued for his arrest. When the authorities began questioning him, petitioner stated that he had been cautioned by his attorney not to speak. At one point he asked to contact his attorney. The request was denied. After the questioning proved futile, a childhood friend, a fledgling police officer was sent in to see him. This officer was instructed to tell petitioner that he might lose his job because of petitioner. Petitioner again asked for his attorney without success. A second and third session between the fledgling officer and petitioner were unsuccessful but at a fourth ses-

sion petitioner agreed to make a statement. The statement was completed at 4 a.m. This statement was found to be the result of petitioner's will having been overborne by official pressure, fatigue and sympathy falsely aroused "after considering all of the facts in their post-indictment setting."

Patently, the factual situation is not comparable to the instant case. While in the *Spano* case (360 U.S. 315, *supra*), the fledgling officer persuaded the petitioner to talk regardless of the advice he had received from his counsel, in the present case Atchley voluntarily related the facts of the shooting to Travers at the first conversation. He merely repeated this same story at the time of the tape recorded statement. Travers did not attempt to elicit information from Atchley at the tape recorded session, he merely directed the course of the conversation to cover the relevant material Atchley had previously given him. There is no evidence in the record nor did Atchley, himself, testify that Travers either promised him anything or made threats against him if he did not tell him the story. On the contrary, Atchley neither repudiated this story nor raised any question of its voluntariness when he testified at the trial in this matter.

The conduct of the law enforcement officials in this case patently was not such as to shock the sensitivities as was found to be present in *Rochin* v. *California*, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 (1952), where this Court found the use of a ston h pump

to be abhorrent. It did not involve the use of brutality such as *Lee* v. *Mississippi*, 332 U.S. 742, 92 L.Ed. 330, 68 S.Ct. 300 (1948). It cannot be fairly compared to the psychological coercion applied in the cases of *Leyra* v. *Denno*, 347 U.S. 556, 98 L.Ed. 948, 74 S.Ct. 716 (1954), or *Spano* v. *New York*, 360 U.S. 315, 3 L.Ed. 2d 1265, 79 S.Ct. 1202 (1959). It has none of the attendant circumstances found in *Blackburn* v. *Alabama*, 361 U.S. 199, 4 L.Ed. 2d 242, 80 S.Ct. 274 (1960), where we have a long showing of mental illness by petitioner prior to the commission of the offense, at the time of the offense, as well as at his apprehension and when the confessions were made.

Thus it is submitted that the record does not support the petitioner's contentions that the tape recorded statement in any manner constituted a coerced confession which would have vitiated the state court proceedings.

III. A Proper Foundation Having Been Laid in the Trial Court to Show That the Challenged Statements Were Voluntary, Their Admission in Evidence Did Not Constitute a Denial of Due Proces.

The California Supreme Court by its decision in *People* v. *Atchley*, 53 Cal.2d 160, 346 P.2d 764 (1959) (R. 560-574), has held that admissions as well as confessions must be voluntary to be admissible in evidence. With this standard in mind, it evaluated the statements complained of in the instant case and concluded that these statements were freely and vol-

untarily made (*People* v. *Atchley, supra,* at 169-171) (R. 560-574 at 565-6).

The California Supreme Court adopted a correct standard as to the admissibility of statements or confessions contrary to the Connecticut courts in *Rogers* v. *Richmond,* 40 O.T. 1960, ___ U.S. ___, 5 L.Ed. 2d ___, 81 S.Ct. ___.

In evaluating the criteria to be applied the California Supreme Court stated: (*People* v. *Atchley, supra,* at 170) (R. 566)

> "Involuntary confessions are excluded because they are untrustworthy, because it offends 'the community's sense of fair play and decency' to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime. (*People* v. *Berve,* 51 Cal.2d 286, 290, 293 [332 P.2d 97]; see *Watts* v. *Indiana,* 338 U.S. 49, 54 [69 S.Ct. 1347, 1357, 93 L.Ed. 1801]; *Lyons* v. *Oklahoma,* 322 U.S. 596, 605 [64 S.Ct. 1208, 88 L.Ed. 1481].) All these reasons for excluding involuntary confessions apply to involuntary admissions as well. (See *Oppel* v. *United States,* 348 U.S. 84, 90-92 [75 S.Ct. 158, 99 L.Ed. 101]; Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A. L. Rev. 43, 68.) Accordingly, any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily."

To the same effect see, *People* v. *Trout,* 54 Cal.2d 576, 354 P.2d 231, 6 Cal. Rptr. 759 (1960); *People* v. *Matlock,* 51 Cal.2d 682, 336 P.2d 505 (1959).

This standard is comparable to that set forth by this Court in *Rogers* v. *Richmond, supra,* wherein it is stated:

> "The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth."

Here the record showed that Mr. Travers testified that he came to the jail on August 5 in response to a telephone call from petitioner asking him to bring some cigarettes and to talk about the decedent's insurance policy (R 224-6, 231). He had this conversation with petitioner at 10 a.m. on August 5 (R 224, 231). At this time petitioner of his own accord told him of the events on the night of the shooting (R 232-233, 246, 250). As Mr. Travers stated: (R 232)

> "A. No. Mr. Atchley brought the subject up to me when he was sitting there. I was sitting there and we were talking about the policy and he brought the whole story as he told it to me exactly what happened. He voluntarily told me about it. I did not ask him about it the first time."

After this conversation and as Mr. Travers was leaving the jail, the undersheriff asked him if petitioner had said anything and he told the police officer that petitioner had told him what happened the morn-

ing of the shooting (R 224, 234). Then the officer asked if he would go back and talk with petitioner and whether he minded if that conversation was recorded (R 224, 234, 240). Mr. Travers stated he would not mind as he also had to have further information for his company (R 224, 234). This tape recording was of the second conversation which was just the same as the first (R 224, 225, 232). Mr. Travers further testified that he did not offer petitioner any threats, inducements, promises or anything to get him to talk to him and that he indicated to petitioner that the material petitioner gave him would be reported to his company (R 225, 226-7). The only notes Mr. Travers took of the second conversation were as to the ages of the children and the address of Jack's brother and sister whom petitioner wanted him to contact regarding one of the children (R 232-3).

Thus there was no question before the court that petitioner's statements were other than voluntary.

The petitioner did not take the stand and directly challenge the voluntariness of any of the statements he made to either the police or to Mr. Travers. He did take the stand at trial and state that he could not remember the contents of the statements because of shock, lack of sleep, and stated that he asked for an attorney but the request was not granted (R. 382, 412-3, 415, 417).

Petitioner at no time urged that he was not arraigned within the proper time, that he was subjected to any form of brutality by the police, that he was

questioned by relays of officers for undue periods of time, that he was held incommunicado or that he had secured counsel whom he wished to contact. On the contrary, the record discloses that petitioner suffered from none of these factors.

The statement complained of as "coerced" was merely a repetition of a prior one, admittedly voluntarily made by petitioner to Mr. Travers. The sole difference between the taped statement introduced as Peo. Ex. 34 (R. 194-201) and the prior statement was the fact the Peo. Ex. 34 was a statement in petitioner's own words made to Mr. Travers at the request of the police in order that it be recorded, unknown to petitioner. It does not appear that this factor in and of itself is sufficient to render such statement involuntary, particularly where, as here, petitioner on the stand at trial repeats the same story.

The independent testimony at trial fully corroborated the contents of the statement given to Mr. Travers as well as the statement given to the police by petitioner on August 7, 1958. In these statements and in his testimony, petitioner made the statement that he did not intend to kill the deceased but that the shooting was the result of a struggle for the gun.

These statements and testimony would clearly refute any contention that petitioner's will to resist was overborne by the police or by Mr. Travers allegedly acting as an agent of the police (cf. *Rogers* v. *Richmond,* 40 O.T. 1960, ____U.S. ____, 5 L.Ed.2d ____, 81 S.Ct. ____).

It should also be noted that petitioner as well as his counsel prior to trial had full opportunity to read and listen to petitioner's prior statements given to both the law enforcement officers as well as to Mr. Travers and therefore had full opportunity to prepare to contravert them at trial if in truth and in fact they were coerced in any manner (cf. *Cicenia* v. *LaGay*, 357 U.S. 504, 2 L.Ed.2d 1523, 78 S.Ct. 1297 (1958)). This they did not do.

It is submitted that where as here the State affords to a defendant a full opportunity to challenge the voluntariness of his incriminating statements or confessions at a hearing outside the presence of the jury and again at the trial, a defendant may not fail to avail himself of this opportunity and then by unresponsive volunteered statements seek to properly urge a question of "coerced" confessions.

The entire record in this case including the position taken by counsel for petitioner in the trial court demonstrates that petitioner did not consider these statements as a "confession" (R. 213, 214-5, 216-7, 220; R. 5-17).

It is submitted that in the instant case there is no showing of a "wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and the sentence wholly void" (cf. *Brown* v. *Mississippi*, 297 U.S. 278, 80 L.Ed. 682, 56 S.Ct. 461).

Since a proper foundation was laid in the trial court for the introduction of the statements com-

plained of to show that they were voluntarily made by petitioner and freely self-determined (regardless of the prior California procedure on the subject of admissions) it is submitted that California has complied with this Court's standards and has not denied petitioner due process of law regardless of the denomination of such statements as confessions or admissions.

IV. The Principles Enunciated in Crooker v. California, 357 U.S. 433, and Cicenia v. LaGay, 357 U.S. 504, Should Be Applied in This Case

Petitioner asks this Court to review its prior decisions in *Crooker* v. *California,* 357 U.S. 433, 2 L.Ed. 2d 1148, 78 S.Ct. 1287 (1958), and *Cicenia* v. *LaGay,* 357 U.S. 504, 2 L.Ed.2d 1252, 78 S.Ct. 1297 (1958). He now wishes the Court to conclude that the refusal of the police to refrain from questioning a suspect in a murder case until such suspect obtains counsel in and of itself is a denial of due process of law.

Petitioner would have every state denial of a request to contact counsel as an infringement of his constitutional rights without regard to the circumstances of the case. This is premised on the contention that the denial of the "guiding hand of counsel at every step in the proceeding against him" (*Powell* v. *Alabama,* 287 U.S. 45, 69, 77 L.Ed. 158, 53 S.Ct. 55 (1932)) is within the requirements of due process

of law as imposed upon the States by the Fourteenth Amendment (*Chandler* v. *Fretag*, 348 U.S. 3, 99 L.Ed. 4, 75 S.Ct. 1 (1954)).

Such a standard has not been laid down by this Court for federal prosecutions nor should this standard be imposed as a matter of constitutional compulsion (*Cicenia* v. *LaGay*, 357 U.S. 504, *supra*).

The refusal to permit police to contact suspects without the presence of their counsel will admittedly hamper law enforcement agencies in bringing the guilty to justice and will impose harsh penalties upon the innocent. If an innocent person may not voluntarily give an explanation to the police which will clearly exculpate him from any connection with the offense but must wait until he has first secured counsel he will be penalized. In the case of indigent defendants this would require their being held in jail until after the arraignment and counsel had been afforded to them by the court. Various states differ in their methods of appointment of counsel. Not all states provide counsel for indigents in other than capital cases. California however does. Patently, the adoption of such a rule as advocated by petitioner though affording full protection to the guilty will cause undue injury to the innocent as well as delay the prompt and efficient administration of justice.

This Court stated in *Crooker* v. *California*, 357 U.S. 433, *supra*, at 439-40.

"The right of an accused to counsel for his defense, though not firmly fixed in our common-law heritage, is of significant importance to the preservation of liberty in this country. See 1 Cooley's Constitutional Limitations (8th ed. 1927) 696-700; 2 Story on the Constitution (4th ed. 1873) § 1794. That right, secured in state prosecutions by the Fourteenth Amendment guaranty of due process, includes not only the right to have an attorney appointed by the State in certain cases, but also the right to an accused to 'a fair opportunity to secure counsel of his own choice.' *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932); *Chandler* v. *Fretag*, 348 U.S. 3 (1954).

"Under these principles, state refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, *Chandler* v. *Fretag, supra,* but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.' *Lisenba* v. *California*, 314 U.S. 219, 236 (1941). Cf. *Moore* v. *Michigan*, 355 U.S. 155, 160 (1957)."

Petitioner would have this Court hold that the denial by the police to a defendant of the right to be free from any questioning until he has his counsel present, in and of itself, denies him that fundamental fairness which is essential to the very concept of justice. This should not be the law nor does the factual

situation here present warrant the adoption of such a rule.

Petitioner infers that if the petitioner had been afforded counsel prior to seeing Mr. Travers he would have had no necessity for talking to him and hence the alleged coerced confession would not have been given. However, petitioner by his own statements merely wanted an attorney to preserve the fingerprints on the gun so they would substantiate the tale that he gave both Mr. Travers and at the trial. Petitioner as appears from the record originally volunteered to assist the police in apprehending the true culprit (R. 403). At that time he denied knowledge of the shooting, being at the scene or ever having a similar gun. This was when he was first questioned by the officers. He later changed this story after the gun was found on his premises and then admitted his first story was not true. When he first spoke to Mr. Travers, at which time there is no question but that Mr. Travers was *not* acting as a police agent, he gave Travers the same story petitioner later repeated at trial. Since petitioner regarded Mr. Travers as a friend and since petitioner voluntarily first told him this story, it does not appear that an inference may be drawn that he would not have seen Mr. Travers if petitioner had first had an attorney.

Further, petitioner in this case was not precluded from any attempts to secure an attorney. His brother was endeavoring to hire counsel for him (R. 354-355).

His brother was not prohibited from seeing petitioner or discussing his case with him (R. 354-355). At the time petitioner asked for counsel, the only showing made was that petitioner did not as yet have counsel of his own choice. This presents a far different situation than *Powell* v. *Alabama*, 287 U.S. 45, *supra*, where the whole bar was appointed to represent defendants who were friendless, in a strange county, threatened with mob violence and given no opportunity to secure counsel of their own choice. Again in *Cicenia* v. *LaGay*, 357 U.S. 504, *supra*, petitioner was indicted and accompanied by counsel of his choice when he surrendered. He was refused permission to contact this counsel while he was being interrogated. In *Crooker* v. *California*, 357 U.S. 433, *supra*, petitioner was refused permission by the police to arrange for a particular attorney. No showing was there made that he had anyone acting in his behalf as did petitioner herein.

Petitioner in the instant case was aware of his rights. His interview with Travers which is complained of as a coerced confession came after he had been arraigned and advised of his rights. Even had petitioner been represented by counsel and advised to make no statement, petitioner cannot now show this would have precluded him from answering or that he would have stated matters any differently than he did at the time of the trial.

Here petitioner did have counsel not only at the trial but at all the preliminary proceedings save the

period of investigation prior to the preliminary examination. Since his counsel prior to trial had available to him all petitioner's pretrial statements as well as the alleged confession he had full opportunity to prepare for trial and challenge this evidence on any permissible ground at the time of trial. On a review of this record it does not appear that petitioner's trial was in any manner infected with an absence of fundamental fairness within the meaning of the Fourteenth Amendment.

Under the due process rule of the Fourteenth Amendment, the restrictions placed upon states and their conduct toward defendants in criminal cases should not be made more stringent than those imposed by this Court upon the administration of justice under its supervisory power over the Federal Courts. This is the request made by the petitioner herein and we submit that neither reason nor justice requires this result.

It is submitted that the requirement of affording counsel to every suspect prior to being questioned by the police would preclude law enforcement from carrying out its functions to protect society. It would merely afford the guilty an opportunity to better conceal the fruits of their crimes and place heavy burdens upon state officials who are already working under heavy handicaps.

By petitioner's own testimony at the time of trial in the present action, the jury was warranted in im-

posing a death penalty upon him when it rejected his attempted explanation of the shooting. This was the same explanation that appeared in the statement given to Mr. Travers at the instance of the police, and voluntarily prior to that by petitioner. Thus, it can hardly be urged that the denial of a request to contact counsel or a refusal to halt investigations to permit petitioner to have counsel present occasioned the statements complained of.

Thus under the admitted facts of this case, it is apparent there is not presented to this Court a situation which would warrant the imposing of restrictions on state law enforcement officers more stringent than those imposed upon federal officers.

In the present matter there was no threat of mob hostility; no holding of a petitioner incommunicado; no subjection of the petitioner to brutality or threats of brutality; petitioner was neither a stranger in the community, friendless or removed from friends and family. He was not a minor, had previous experience with the law, had previously testified falsely under oath and had previously utilized attorney's services. Although he was illiterate, this in and of itself was offset by the fact that he had successfully maintained a business and managed to accumulate property. He had traveled over the United States and, although he originally may have come from a small mountain community, he had resided some twelve to fourteen years

in California subsequent to that time. His periods of questioning by the police were not continuous and there was at least a twenty hour respite before the claimed "confession" was given to Mr. Travers. The claimed "confession" was immediately preceded by one that was admittedly voluntary to the same individual and to the same effect. Even if petitioner had counsel, it cannot be said he would not have made a similar statement.

Thus, it is submitted that petitioner herein was not denied the "guiding hand of counsel at every step of the criminal proceedings" in such manner as would invalidate his conviction under the federal law.

CONCLUSION

Respondent submits that an examination of the state court record conclusively demonstrates that petitioner was fairly convicted pursuant to California law and that there was not an absence of "that fundamental fairness essential to the very concept of justice" which would bring the action within the purview of the Fourteenth Amendment and require a reversal by this Court.

It is respectfully submitted that the instant judgment should be affirmed or the writ of certiorari dis-

missed as improvidently granted (*Bullock* v. *South Carolina*, 78 O.T. 1960).

Respectfully submitted,

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PETITION NOT PRINTED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, also known as
JACK ATCHLEY,

Petitioner,

vs.

CALIFORNIA,

Respondent.

REPLY TO BRIEF OF RESPONDENT

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Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, section 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code, section 825:

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; and after such arrest, any attorney at law entitled to practice in the courts of record of California, may at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of such prisoner so arrested who wilfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any such officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of $500, to be recovered by action in any court of competent jurisdiction."

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, also known as
JACK ATCHLEY,

Petitioner,

vs.

CALIFORNIA,

Respondent.

REPLY TO BRIEF OF RESPONDENT

Introductory

Petitioner has no wish unduly to add to the briefs herein. Yet, mindful of the fact that this is a capital case and that a man's life literally may hang in the balance, counsel feel an obligation not to let respondent's brief go unanswered. Hence this reply.

ARGUMENT

I.

The Tape Recorded Confession Was Elicited, by Means Proscribed by the Constitution, for the Sole Purpose of Insuring a Conviction.

Respondent relies heavily upon certain inferences which it would have this Court draw from evidence in the record: (1) the tape recorded statements must be voluntary be-

cause petitioner had previously had a similar conversation with Mr. Travers; (2) petitioner knew his statements would be released to the insurance company; (3) Travers did not attempt to elicit information but merely "directed the course of the conversation to cover relevant material Atchley had previously given him" (Resp. Br. 26).

The first two arguments are quickly answered; and as to number one, respondent is hoist by its own petard. If, without the taped statements, the State had made its case, with a completely voluntary confession from defendant, why was it not content to rest there? For what reason did the State instead decoy petitioner into making another statement and to record it without his knowledge? The mere fact that the statements were secured in the manner set out in petitioner's opening brief, pages 7-8, raises more than a mere aura of suspicion that the State deliberately set about, through the use of Travers, to delude defendant into making a confession which would more certainly bring about a conviction.

That petitioner knew his statements would be released to the insurance company lends no aid to respondent's position. Travers told Atchley several times (R. 195, 196, 198, 199)—warned him, if you will—that this would be so. Never once did he give warning either that the conversation was being recorded or that it would be used against him in a criminal prosecution. It is unnecessary to speculate whether Atchley could know that disclosure for insurance purposes, as he thought, could be used in evidence. The salient and revealing fact is that Travers, acting at the special request of the deputy sheriff and knowing that the conversation was being recorded, artfully directed Atchley's attention away from a criminal trial and toward the interest of the insurance company.

As to respondent's third point, we have no wish to engage in an argument of semantics as to whether Travers was "attempting to elicit information" or "merely directing the course of the conversation." We merely ask the Court to look to the questions he put and are content to rest with the conclusion reached by the Court. Omitting some of the irrelevant matter, Travers' questioning went like this (R. 195-201):

> "Can't understand it. Goofiest thing. This is really something. See, we are interested too how the darn—I mean, how it come about, you know, like you were telling me this morning, and I have got to write a letter to that— You were standing at the corner of the house? I won't write none of this down. I can remember. I don't want nothing on paper. Tell me something. She lunged. What did she do? When she walked up the walk what exactly did she do? Where was the gun actually at, Jack? Right in your belt? Did she get it out of your belt? Then what happened after she grabbed the gun out of your belt? (Bent her arm back) towards her again? In other words, you had the gun in your hand then? Well, I'll be darned. And then it went off twice more. Five times. Then she fell right there didn't she. That's too bad because I am going to have to write this up and send it in to the company. There is one point I should put in there too. Jack, what did you have the gun for in the first place? Where did your find the gun? Where was the gun? Yes, the gun that you had in your belt. Did you bring the gun over with you? Well, you had it with you all that evening and you brought the gun over? And had it in your belt and you waited— What did you have the gun in your belt for? For what purpose? She was running around with fellows? Oh I

see. God Almighty, that would make a guy feel sort of bad. Did you just plan on scaring her or scaring him? That was about what time? That's 2:00 a.m. in the morning she had not arrived home yet and you waited for her behind the house? And you had the gun in your belt. Did you make an attempt to pull the gun or anything? She seen the gun? Then what happened? Oh I'll be damned. Then you tried to get the gun away from her? That's when it happened. I think I got it pretty straight. Whose gun was it? Was it registered in your name? It wasn't even registered? Where did you buy it? What was his name? G. W.? And he lives on Honcut road or right in Honcut? Boy, oh boy. You got your cigarettes? I got to write this up to the company. We got to think of the children. I want this information. In other words, I mean just what you told me here now, let me see if it is exactly that way. You were supposed to go to a dance at 8:00 o'clock at Robinson's corner? All right. And you had other business to attend to? What type of business? 9:30 at night? Then you went back to Palermo? Where did you pick the gun up? You had the gun in the glove compartment? I see. And then what time did you go out to Gridley? Then you were with these fellows up to that time, the flat tire. How long did you wait for her? 25 minutes. About 2:20 you told me. So she got out of her car and she walked up the walk and she was by herself. I see. One hundred per cent, as far as the policy, I am almost positive. Like all policies, they have to be underwritten by the company. And I got to write all of this to the company and let them know just exactly what happened. So let me get it straight now. She got out of the car? Right in front of her? Now, did you have the— How was the gun— Right inside of your belt? I see. And

she could see it. In other words, the shirt wasn't over it? You had your shirt tucked in? So she saw the gun? Then what happened? You grabbed the gun with both hands? Where did the shells hit? And then what happened after the gun went off three times? And then you had the gun in your hand? Two times more. What did you do after that? Where did you park the car? Then you went home? What time did you get home about? What's this I heard about the— I mean, we have to send in the whole headline. They say they found a gun in your back yard buried. Did you bury it back there? What did you do with the holster? What time did the police arrest you? 4:00 o'clock. About an hour after you got home. Did you go home and just bury the gun right away? I know I read in the paper about where they got the gun buried in the back yard. . . . "

Parenthetically, petitioner does not feel able, from the record, either to agree with or forcefully to controvert respondent's claim that all of this was merely a repetition of what Atchley had previously told Travers. The record shows that Travers merely said the two conversations were about the same (R. 231, 232, 236, 246) and that they overlapped in his mind (R. 243), except that he asked more questions in the second (R. 236, 232); and this is not a strong basis for saying with certainty that nothing new was added in the second conversation, laden as it was with leading and suggestive questions.

Petitioner maintains that, in the totality of the circumstances shown by the record, the action of the State in securing the tape recorded confession in the manner shown is no mere innocuous thing, but is so inimical to our accusatorial system as to require a reversal.